

**BEFORE THE HORSE RACING BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Complaint Against:

TODD PLETCHER
CHRB License # 272025

Respondent

Case No. SAC 09-0040

DECISION

The attached Proposed Decision is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on January 21, 2010.

IT IS SO ORDERED ON January 15, 2010.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman

A handwritten signature in black ink, appearing to read "Kirk E. Breed", written in a cursive style.

Kirk E. Breed
Executive Director

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In the Matter of the Complaint Against:)

TODD PLETCHER)

Trainer,)

CHRB License No. 272025)

Respondent.)

Case No. SAC 09-0040

2009 DEC 29 PM 11:13

**RECEIVED
CHRB**

PROPOSED DECISION

This Complaint was heard by Steffan Imhoff, a Hearing Officer designated under California Code of Regulations, title 4, section 19517.5(a) by the California Horse Racing Board (CHRB). Hearings on the Complaint were held at Del Mar, California, on July 27 and July 28, 2009.

Deputy Attorney General Bruce Reynolds represented the CHRB.

Rick Amieva, Special Investigator, and Rick Arthur D.V.M. also appeared for the CHRB.

Attorney Neil Papiano of Iverson, Yoakum, Papiano & Hatch represented the Respondent, Todd Pletcher. Mr. Papiano was assisted by attorney Richard Moore.

Mr. Pletcher participated telephonically.

The proceedings were transcribed by Barbara Weinstein, Hearing Reporter.

Alexandra DeKoster acted as Court Clerk.

The Complaint was submitted for decision on November 17, 2009.

INTRODUCTION

Wait a While stood near the top of the Equine World. She preened victorious in the Winners Circle following a devastating victory over her rivals in the Yellow Ribbon, Santa Anita's premier grass race for fillies and mares.

Wait a While had won this same race 2 years previous and then had gone on to be named 3 year old champion filly of 2006. Now she had run the "perfect prep" for the \$2,000,000 Breeders' Cup Filly and Mare Turf to be run at Santa Anita on October 24, 2008 and was certain to be one of the favorites to win that race. She blew past her opponents like a grey ghost, winning 3 Grade 1 races in 4 starts on the Santa Anita turf course. Her victories had created, "a sense of euphoria among the people closest to her," particularly Todd Pletcher, her 4 time Eclipse winning trainer. But euphoria in Thoroughbred horse racing can be short lived.

Almost immediately after the Yellow Ribbon Wait a While started showing symptoms of pneumonia. After consulting with his veterinarian, Dr. Joseph Dowd, Respondent agreed to have the mare treated with injections of Procaine Penicillin G. The Procaine would numb the injection site and increase blood flow. The Penicillin would treat the illness. Pletcher was aware that there was a risk in treating his horse with Procaine so close to the Breeders' Cup. CHRB rules limited the amount of Procaine in the urine on race day to 10 nanograms per milliliter. Violation of this rule results in a Class 3 drug violation. Respondent, relying on the advice of his vets believed that if the Procaine Penicillin G treatment was discontinued October 6, some 18 days before the race that this would be sufficient withdrawal time to be in compliance with the Procaine limitations.

On October 24, 2008 Wait a While, along with 9 other horses, started In the Breeders' Cup Filly and Mare Turf run at a mile and two furlongs on the Santa Anita turf course. Piloted by John Velazquez, she was narrowly beaten by Forever Together ridden by Julien Leparoux as well as long shot Sealy Hill with Patrick Husbands in the irons..

Her game effort is described in the official notes: Wait a While stalked the pace outside, bid three deep on the backstretch and second turn, came out some in the stretch, battled outside rivals in mid stretch, put a head in front in deep stretch and continued willingly to hold third.” The purse she earned for 3rd place was \$213,000, while the winner’s share was \$1,150,000.

After the race Wait a While’s urine was tested at the Maddy Lab in Davis the results showed a level of Procaine more than 300 times over the allowable amount. When the split sample tested at the Pennsylvania Equine Research Laboratories confirmed the overage the Complaint charging Respondent with a Class 3 drug violation was filed. (SAC 09-0040.) Hearings were held and briefs were submitted on the Complaint and this Proposed Decision now follows.

PROCEDURAL BACKGROUND

The Complaint in this case was filed on December 4, 2008. It was originally numbered 08HP0069 but then renumbered SAC 09-0040. The Complaint alleges that Wait a While, a mare trained by Todd Pletcher (Lic. No. 272025) ran in the 6th race, at the Oak Tree Meeting at Santa Anita, on October 24, 2008, with an excess of Procaine in her urine in violation of CHRB Rules 1843.2, 1844 (a), (b) and (d) and 1887. The Complaint states, in pertinent part that:

The official urine sample SA0610 taken on October 24, 2008 at Oak Tree Association was reported by Scott Stanley of U.C. Davis Laboratories to contain Procaine in excess of the authorized decision levels. This sample was obtained from the horse Wait a While which ran in the 6th race at Oak Tree Association finishing 3rd. The trainer of record is Todd Pletcher. A split was conducted at Pennsylvania Equine Research Laboratory. The split confirmed the presence of (an excess) of Procaine.

Pretrial motions and witness lists, as per the Court’s Order were filed on July 13, 2009. Respondent filed a motion including a request to subpoena certain witnesses and

for discovery of CHRB and Breeders' Cup security plans. The CHRB's motion to block these requests, being unopposed, was granted.

The hearings on the Complaint were held at the Surfside Satellite Facility in Del Mar, California on July 27 and 28, 2009. Each side presented several witnesses as well as a number of exhibits. The parties also entered into certain evidentiary stipulations. At the conclusion of the hearing the record remained open to receive additional briefing. The CHRB Closing and Penalty Brief was filed on September 21, 2009. The Respondent Closing and Penalty Brief was filed on October 22, 2009. The CHRB Closing and Penalty Reply Brief was received by the Hearing Officer on November 17, 2009 and the Record was ordered Closed as of that date. The Court also received a Letter Brief filed by Respondent in response to the Attorney General Reply Brief. The Letter Brief was not part of the briefing schedule. However, since the Attorney General Reply Brief raised a new issue concerning the barn security question the Respondent Letter Brief will be allowed on that issue.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

I. EVIDENCE OF A *PRIMA FACIE* CASE

(1.a.) Trainer of Record:

Respondent Todd Pletcher, trainer license no. 272025 was at all relevant times the trainer of record for the 5 year old mare Wait a While.

(1.b.) Breeders' Cup Race:

Wait a While ran in the 6th race at Santa Anita Park on October 24, 2008, in the \$2,000,000 Filly and Mare Turf. She finished 3rd and earned a purse of \$215,000. (That prize has been ordered forfeited and the purse redistributed in a separate case that is on appeal to the CHRB).

(1.c.) Testing Her Urine:

Subsequent to the race Wait a While was one of the horses chosen to have her urine collected and tested for potential medication violations. Normally the tested horses include the winner, and the horses that finish 2nd and 3rd in a Stakes race. (Rule 1858) There was no evidence that a different criterion was used for Breeders' Cup races. Since Wait a While finished 3rd her selection to be tested was automatic under the rules.

(1.d) Chain of Custody:

Respondent did not object to the chain of custody evidence and stipulated to most of it. The urine sample was taken on October 24, 2008 at the Santa Anita post race testing barn by assistant veterinarian Gilberto Ruano a CHRB employee. Ruano had done this job for twenty two years. Prior to taking Wait a While's sample Ruano checked her lip tattoo, G08817, to make sure he had the correct mare. He then wrote her lip tattoo number on the Acknowledgment of Test Sample Form.

Ruano split the sample and sealed it in two separate bottles and gave the split sample bottles and the Form to another CHRB employee Christine Beer the evidence clerk for the post-race testing barn. The bottles and the Form both had the inventory number for Wait a While's urine sample –SA06010. On October 25, 2008 at the conclusion of the Breeders' Cup races and post-race testing she placed all of the primary samples, including Wait a While's, into coolers which were then locked.

The locked coolers were turned over to Christine Lomas. Ms. Lomas is the sample custodian for the Equine Analytical Lab at U.C. Davis, also known as the Ken Maddy Lab or simply the Maddy Lab. When she received the coolers she signed Ms. Beer's Evidence Clerk's Log Book which included sample number SA06010-Wait a While's urine sample.

Ms. Lomas had been instructed by Santa Anita officials to personally deliver the coolers to the Maddy Lab to expedite the testing. By driving to Davis on Saturday night

she would be able to deliver the samples to the Lab on Sunday. Because Fed Ex doesn't pick up or deliver on Sunday the samples would not be received until Tuesday if sent by Fed Ex. However because there was not the same urgency in delivering the split samples they were sent by Fed Ex on Monday October 27, 2008 and received at CHRB on Tuesday October 28th.

Christian Lomas drove the primary samples to Davis along with another Maddy Lab employee Stacy Steinment. They left on Saturday evening, stopped at the Harris Ranch Hotel on Saturday night and arrived at the Maddy Lab in Davis on Sunday. The locked coolers containing the primary samples were kept with them at all times. These samples arrived at the Maddy Lab without damage or contamination.

Lomas and Steinment then took the samples into the sample processing Lab. The samples were removed from the coolers or ice chests and the ladies verified through their paperwork that they had the correctly numbered samples. Those numbers were then logged into the computer.

(1.e.) Results of Testing Wait a While's Urine:

For the past 13 years Doctor Scott David Stanley has been in charge of the Maddy Lab and all testing that is done there. He has a PhDs. in Pharmacology and Toxicology. He supervised the testing of sample SA06010-Wait a While's urine sample that was tested at the Maddy Lab on October 27, 2008.

Dr. Stanley explained that the sample was initially screened using a gas chromatography mass spectrometer. This test indicated the presence of Procaine; therefore under the Lab's protocol the sample was listed as "failed" and subject to secondary testing. This confirmation testing establishes not only the presence of Procaine but also the quantity present. Because of the high concentration of Procaine the sample was diluted so it could be measured within their calibration curve. The quantity was measured in duplicate and the average diluted result was reported as 36.49. The recalculated undiluted result was reported as 3649 nanograms of Procaine per milliliter.

The allowable amount of Procaine in the urine is only 10 nanograms per milliliter. (Rule 1844(e)(7)). As per Rule 1859.25 Respondent was notified of this drug violation. Pletcher choose to have the split sample tested at the Pennsylvania Equine Toxicology and Research Laboratory. The Pennsylvania Lab reported that the split sample contained 1029.310 nanograms per milliliter of Procaine. This confirmed the finding of the Maddy Lab that Wait a While ran in the 2008 Breeders' Cup Filly and Mare Turf race with a level of Procaine in her body that far exceeded the allowable amount.

(1.f.) *Prima Facie* Case: (Conclusion of Law)

The "Trainer Insurer" rule states that (t)he trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties.... If the chemical or other analysis of urine....prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his...license suspended or revoked, or be ruled off. (Rule 1887).

In addition the "Medication and Drug" rule warns trainers that (a) finding by an official chemist that a test sample taken from a horse containsa finding of a drug substance in excess of the limits established by the Board for its use shall be *prima facie* evidence that the trainer and his...agent responsible for the care of the horse has/have been negligent in the care of the horse and is *prima facie* evidence that the drug substance has been administered to the horse.(Rule 1843(d)). Here the Attorney General has proven all the elements necessary to make out a *prima facie* violation of Rule 1887 as alleged in the Complaint. The mare Wait a While, trained by Todd Pletcher, ran in the 6th race at Santa Anita on October 24, 2008 with a grossly excessive amount of Procaine in her system. Nothing further is necessary to establish a *prima facie* case. **Therefore the burden has shifted to Respondent to prove a defense to the charges by a preponderance of the evidence.** (Evidence Code Sec. 602)

II. RESPONDENT DEFENSES:

Respondent Pletcher has put forth 3 defenses to the charges in this Complaint: (A) The Safe Harbor Withdrawal Time. (B) The Granuloma Theory. (C) The Rule 1888(c) Defense To The Trainer Insurer Rule

A. The Safe Harbor Withdrawal Time.

(1.a.) Respondent Argument:

Respondent argues that because he and his veterinarian received information from the Maddy Lab and the CHRB that Procaine withdrawal time was 10 to 14 days he can't be faulted for a Procaine positive when he terminated his mare's Penicillin Procaine G treatment 18 days before her race .

(1.b.) Finding of Facts

Respondent presented testimony from his primary California veterinarian, Dr. Dowd. It was his opinion that the withdrawal time for Procaine to an allowable level should be 10 to 14 days. He repeated this opinion concerning 10 to 14 days withdrawal time to Mr. Pletcher. This opinion was based on experience, information from colleagues and allegedly information from the Medical Director (Dr. Arthur) . He conceded that there was no written policy from either the Maddy Lab or the CHRB.

Respondent also relies on a 2001 article , A Review of the Pharmacology of Procaine as it Pertains to the Horse, written by pharmacologist Cynthia Kollis-Baker, DVM. In her article she points out that Procaine is detectable in the equine urine for "prolonged periods of time". In her studies the Procaine was detectable for up to 28 days. While she did write that in these limited studies, with only a 5 day injection protocol, the trace amounts were coming in at under 10 nanograms per milliliter after 14 days, at no point did she suggest that 14 days was a safe harbor for Procaine withdrawal.

Testimony from Dr. Stanley and Dr. Arthur made it clear that there was in fact no "safe harbor" for any drug. Procaine was particularly variable in terms of it clearing from

a thoroughbred horse's system. What Dr. Arthur and Dr. Stanley did was to provide general information concerning Procaine including the fact that the results could be very variable. There is no credible evidence that either doctor, orally or in writing, communicated a safe harbor withdrawal time for Procaine to either Dr. Dowd or Respondent. We find the testimony of Dr. Stanley and Dr. Arthur credible on the issue of there being no safe harbor withdrawal time for Procaine.

Dr. Arthur would advise trainers that if they had any concerns about an excessive Procaine result they should take advantage of the free CHRB testing program. This test has a 48 hour turnaround time and the results will show if there is a problem with a Procaine overage. Respondent denied knowledge of this test. In any case it is up to the vet and ultimately the trainer to avoid a positive test.

Dr. Arthur further testified that in his expert opinion the grossly excessive quantity of Procaine in the mare's system (more than 300 times the allowed amount) meant that she must have been given a Procaine injection after October 6 and probably within a couple of days of the race. We also find the testimony of Dr. Arthur credible on this issue. "Evidence of even one credible witness is sufficient for the proof of any fact." (*Sav-on Drug Stores Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334)

The Safe Harbor Withdrawal Time---Conclusions of Law

(1.c.) Safe Harbor Argument Rejected:

(a) Insufficient Evidence

Respondent has failed to show by a preponderance of the evidence that he reasonably relied on a so called safe harbor withdrawal time. *Overturf v CHRB* (1978) 86 CA3d 979,986.

Trainers may not rely on a safe harbor defense unless the CHRB publishes specific withdrawal times for specific drugs. Here trainer Todd Pletcher may have relied on his veterinarian, Dr. Dowd for a 10 to 14 day Procaine withdrawal time but that is not

a defense to an excessive Procaine finding. (Rule 1887) Trainer Pletcher should have known about the CHRB's testing program for Procaine It is the trainer's responsibility to be aware of what tests are available.(Rule 1894).

(b) Safe Harbor is Inappropriate in this Case:

Even if there was a safe harbor defense this would not be an appropriate case to apply it. We agree with Dr. Arthur that the grossly excessive quantity of Procaine in Wait a While's system means that it is very likely that she received an additional Procaine injection sometime after October 6 and probably within a couple of days of her Breeders' Cup race. Therefore it would be nonsensical to allow a safe harbor defense based on a withdrawal time beginning on October 6 when she probably received an additional injection subsequent to that date.

B. The Granuloma Theory Defense:

(1.a.) Respondent Argument:

Respondent argues that when Wait a While received her Procaine Penicillin G shots in early October one or more of the shots caused a Granuloma to form which trapped the drug in a pocket. He further argues that Granuloma ruptured during the Breeders' Cup race because of the stress of the race thus releasing Procaine in her system and causing the prohibited level.

(1.b.) Evidence on Granuloma Theory: Findings of Fact.

Respondent presented his Granuloma Theory almost exclusively thru the telephonic testimony of Dr. Steven Barker. Doctor Barker is a professor in the school of veterinary medicine at Louisiana State University and the state chemist in the Louisiana State Racing Commission operating their Official Drug Testing Laboratory. He qualified as an expert witness in equine chemistry and equine veterinarian medicine particularly as related to thoroughbred race horses. Dr. Barker explained that a Granuloma is an injection site reaction tissue. It can be formed when there is a problem with a horse's drug injection, for example it is not mixed properly or is given in the incorrect spot. This

causes an irritation which in turn causes an inflammation reaction. The immune system then responds to the inflammation by walling off the area forming a pocket where the drug is held instead of entering the blood stream. This is a Granuloma.

The trapped drug can slowly leak into the system but under duress, such as a horse race or heavy exercise, the Granuloma can rupture releasing a large portion of the drug into the system immediately. Dr. Barker also testified concerning a test on Wait a While's blood that was done 7 days after the race. He thought it was significant that there was still trace levels of Procaine in the blood even though the sample did not have an enzyme that would act as a Procaine inhibitor and keep the Procaine from being destroyed. He felt this meant that 7 days after the race there was probably still a significant level of Procaine in her system. Based on the several days of treatment with Procaine Penicillin G in early October, the grossly excessive amount of Procaine in her system on race day (October 24th) and the traces of Procaine in her blood a week after the race, it was Dr. Barker's opinion that the only reasonable explanation was that Wait a While had a Granuloma that ruptured during the Breeders Cup race.

Dr. Dowd agreed with the theoretical possibility of Dr. Barker's Granuloma argument however in his career he had never actually heard of a Granuloma rupturing during a race

Dr. Finley, the vet that actually gave Wait a While her Procaine Penicillin G injections in early October never saw evidence of a Granuloma following those injections.

Dr. Stanley testified that there was no scientific evidence that a Granuloma could wall of a large dose of medication which could then rupture during a race.

Dr. Arthur testified that during his career he has given tens of thousands of Procaine Penicillin G injections and he had never seen a resulting Granuloma nor has he ever seen or heard a report of this phenomenon. In addition after the excess Procaine

positive he personally examined the mare specifically looking for injection site reactions and found none.

Granuloma Defense- -Conclusions of Law

(1.c.) Rejection of Granuloma Defense---Insufficient Evidence

Respondent has presented insufficient evidence of a Granuloma defense to meet his burden of demonstrating the viability of such defense by a preponderance of the evidence. *Shapiro v. San Diego City Counsel* (2002) 96 CA4th 904,912.

In the first instance we take issue with Dr. Barker's primary assertion that the Granuloma theory is the only logical explanation of the evidence in this case. For example, if Wait a While was given an additional Procaine shot within a couple days of the race that would be one explanation of the grossly excessive Procaine result in her urine. This theory was proffered by Dr. Arthur in testimony. He testified that these excessive numbers could only be explained by a nerve block given a few hours of the race or a Procaine Penicillin G injection given 24 to 48 hours before the race.

Dr. Barker, however, stepping out beyond his area of expertise rejected this explanation because his belief that the Breeders Cup security would have prevented it. Security, of course, is unfortunately not impregnable and in this case had several deficiencies. A late Procaine shot, but not a nerve block, remains a viable theory. More fundamentally Dr. Barker's Granuloma theory does not seem to have either scientific or field evidence to support it. None was offered by Dr. Barker.

Dr. Stanley questioned whether there was any science in back of the Granuloma theory and Dr. Arthur's testimony makes one wonder if a Granuloma rupturing during a horse race ever happens in the real world. There was certainly no evidence that it had ever happened. **In conclusion the Granuloma theory is simply too speculative and unsupported by the evidence in this case to constitute a defense..**

(1.d.) Rejection of Granuloma Defense---Trainer Insurer Rule (Rule 1887)

Even if Respondent had been able to establish Dr. Barker's Granuloma theory that would not constitute a full defense under the facts of this case. After all, it was Dr. Barker's argument that an injection containing Procaine, which was authorized by Mr. Pletcher, resulted ultimately in an excessive amount of Procaine in Wait a While's system on race day. This is almost the definition of a 1887 Rule violation. Under Rule 1887, the trainer insurer rule, Mr. Pletcher, as Wait a While's trainer is the one responsible for this excess Procaine result in her system. While the circumstances of a ruptured Granuloma, **if proven**, might mitigate his responsibility it would not eliminate it.

C. The Rule 1888 c. Defense

Rule 1888 c. provides: A trainer ...charged with a violation of Rule 1887...may defend, mitigate or appeal the charge if: He shows, by a preponderance of the evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons;

(1.a.) Respondent Argument:

Respondent is asserting that because he made every reasonable effort to protect Wait a While from tampering by unauthorized persons he is entitled to a dismissal under Rule 1888 c. In addition Respondent points out that additional barn security was provided by Santa Anita, the Breeders Cup (TRBT) and CHRB. He argues that having taken over a portion of the security the Board cannot now say that he did not comply with 1888 c.

(1.b.) Evidence Regarding Security: Findings of Fact.

Pletcher testified as to the security measures that were put in place at his barn by CHRB, Santa Anita and TRBT starting 72 hours before the race. Security personnel were present 24 hours a day. Security personnel checked the identification of all people in the barn including Pletcher and all veterinarians. Some of the security personnel had hand held cam recorders and filmed the veterinarians doing procedures. The security personnel kept unauthorized people from coming into the barn.

As to his own barn security Pletcher admitted that he had no cameras at the barn to help protect his horses. It was also somewhat ambiguous as to whether or not he had any private security guards on duty at the barn. There were people working at the barn, on and off 24 hours a day including Pletcher, his assistant McCarthy and various grooms who slept at the barn at night. One gentleman, Anacieto Rivas was identified by McCarthy as a “watchman”, but that conflicts with more convincing testimony which indicated he was a groom. In fact it appears that Respondent had no professional, uniformed, armed, security guards on duty at the barn at night.

(1.c.) Discussion: Conclusions of Law

Both the Respondent and the Attorney General have made arguments concerning the effect of other security agencies participating in barn security prior to the Breeders Cup which we find unpersuasive. The Attorney General argues that we should ignore what these other agencies were doing and only look to what security measures Respondent took in judging his Rule 1888 c. defense. We cannot resolve this claim wearing those restrictive blinkers. Determining whether or not Pletcher made “every reasonable effort” has to be examined in the context of what security measures were all ready in place.

Respondent, in turn, argues that the three security agencies, particularly the CHRB, took over Breeders’ Cup security thus preventing a fair evaluation of his Rule 1888 c. efforts. This is simply not accurate. There is no evidence that any agency interfered with Respondent’s security efforts or prevented him from taking any reasonable steps to protect his horses.

Looking at the security scheme as a whole it appears fairly comprehensive. However there are two areas that must be considered in evaluating an 1888 c. defense. First is the question of 24 hour security personnel. While Respondent apparently did not hire security service he testified that it was provided by the Thoroughbred Racing Protective Agency. This testimony was not challenged. Nevertheless we believe that relying solely on an outside security service was not sufficient. A trainer that seeks the

protection of Rule 1888 c. under the circumstances of this case should have had his own professional security service on duty 24 hours a day whose job would be limited to protecting Pletcher's Breeders' Cup horses. This was not done.

Equally important is the question of fixed video cameras. There is no evidence that fixed video cameras were part of the security agencies plan or that they were provided by Respondent. Quite the contrary is true as the evidence shows clearly that no such cameras were in use in the Pletcher barn. This is inexcusable. Every 7-11, or mom and pop market has this technology. It seems inconceivable that it would be absent from a security system that was protecting multimillion dollar horses that were about to run in multimillion dollar races. **Under these circumstances we are unable to find that Respondent has made out a Rule 1888 c. defense.**

CONCLUSION

Having established that Respondent was (1) the trainer of a mare that ran in the Breeders' Cup Filly and Mare Turf and (2) he ordered her treated with Procaine Penicillin G injections prior to the race and (3) she ran in the race with an excessive amount of Procaine in her system. These facts established a *prima facie* violation of Rule 1887, the Trainer Insurer Rule and shifted the burden to Respondent. Respondent presented three defenses: (A) Safe Harbor, (B) Granuloma Theory and (C) 1888 c. We have rejected all three of these defenses as being legally and/or factually insufficient. In short, the Respondent has failed to establish a defense by a preponderance of the evidence. **Therefore we hold that the Complaint (Sac 09-0040) has been proven true and we turn to the question of penalty.**

PENALTY

I.

II. Authority of CHRB to Impose a Suspension or Fine on Respondent

It is undisputed that having found the Complaint to be true the CHRB has the authority to impose a fine or suspension on Pletcher. The granting of these powers, including the power of the CHRB to adopt Rules and Regulation concerning punishment can be found in Business and Professions Code Sections 19420, 19440, and 19461.

In addition Rule 1405 specifically empowers the CHRB to suspend or fine any licensee for any violation of the Rules;

Violation of any provision of this Division, whether or not a penalty is fixed therein, is punishable in the discretion of the Board by revocation or suspension of any license, by fine or by exclusion from all racing inclosures under the jurisdiction of the Board, or by any combination of these penalties. The Board may independently punish any misconduct of any person connected with racing. (Rule 1405)

Rule 1887 specifically authorizes the CHRB to suspend or fine a trainer when a prohibited level of a drug turn up in his horse's urine:

...If the chemical...analysis of urine...prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. (Rule 1887)

Rule 1843.1(b) defines prohibited drug substances to include "any drug, substance, medication or **chemical authorized by this article in excess of the authorized level** or other restrictions as set forth in this article. (Emphasis added) Under Rule 18434 (e) (7) **Procaine** is listed as a restricted authorized medication. A horses' post race urine sample may contain no more than 10 nanograms per milliliter. We have previously found that Wait a While's post race urine sample contained 3,649 nanograms per milliliter. This result in excess of the allowable amount was confirmed by the results from the split sample. Therefore, Respondent, as trainer, is subject to the appropriate penalty for an excess Procaine finding.

III. Determining Range of Penalties.

A. Under Rules 1843.2 and 1843.3

In determining what penalties Respondent is subject to in this case we first turn to Rule 1843.2. Classification of Drug Substances. Under this Rule the CHRB is directed to consider the classification chart which divides each Class 1,2,3,and 4 drug into A,B,C, and D penalty categories. Procaine appears on page 11 of a 19 page chart and is officially listed as a Class 3 drug with a Class B penalty rating.

We than turn to the charts attached to Rule 1843.3 where the range of penalties are divided by letter(A-D), owner or trainer and prior record. Because Respondent has no prior violations of Sec.19581 or Rule 1887 the relevant penalties are listed on page 99 of the Horse Racing Rules under Trainer 1st Offence.

Under this section Respondent is subject to a “(m)inimum 30 day suspension absent mitigating circumstances. The presence of **aggravating factors could be used to impose a maximum of a 60 day suspension.**” As to a potential fine a “(m)inimum fine of \$500 absent mitigating circumstances. The presence of **aggravating factors could be used to impose a maximum fine of \$10,000.**

B. Under Business and Professions Code Sec. 19581 and 19582(a)(3)(A).

The Attorney General has argued that Respondent is not only subject to the penalties under Rules 1843.2 and 1843.3 but is also subject to a dramatic increase in potential penalties under Business & Profesions Code Sections 19581 and 19582(a)(3)(A). Respondent objects to the appropriateness of applying these sections but does not challenge their relevance. Section 19582(a)(3)(a) states, in part that (t)he Board may provide for the **suspension of a license for not more than three years---,or a monetary penalty of not more than one hundred thousand dollars (\$100,000), or both, and disqualification from purses, for a violation of Section 19581.**(emphasis added)

Section 19581 states, in part, that “(n)o substance of any kind shall be administered by any means to a horse **after it has been entered into a race,** unless the

board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof.”(emphasis added

It could be argued that section 19581 only applies when a race horse is administered a substance after she has been entered, which by rule is 48 hours before the race. (Rule 1843.5) That interpretation would mean that the enhanced penalties of Section 19582(a)(3)(A) would not apply unless the “dirty deed” was shown to have been done within 48 hours of the race. Nevertheless this question need not be resolved in the case before us. In the first instance this issue has not been briefed by the parties and they have not had the opportunity to argue for the proper interpretation. More importantly as stated earlier in this opinion we accept Dr. Arthur’s expert testimony that the only reasonable interpretation of the evidence, particularly a Procaine level over 300 times the allowable limit, was that Wait a While somehow received an additional Procaine injection 24 to 48 hours before the race. This finding means the language of Section 19581 has been complied with and the possibility of an enhanced sentence under Section 19582(a)(3)(A) remains.

C. Assessing Aggravating and Mitigating Circumstances:

Rule 1843.3 is the Penalty for Medication Violations rule. It provides instruction in determining the proper penalty in medication violation cases. We start with the basic penalty chart that is part of the rule. As previously determined that chart before adjustments for aggravation and mitigation has a suspension range between 30 and 60 days and a fine of between \$500 and \$10,000. Then we assess aggravation and mitigation as to the eleven specific factors listed in the rule. These factors are mandatory and must be considered.

We also are instructed to assess aggravation and mitigation for any other relevant factors for this particular case. It is important to recognize that in looking at aggravation and mitigation it is not just a question of adding up the factors on each side of the ledger. Rather it is the overall strength of the factors that leads to a conclusion of whether a deviation from the norm is required. Just one compelling aggravating or mitigating

finding can outweigh everything on the other side. People v. Grant (1988) 45 Cal.3d 829, 857, fn.5. Finally, the findings on aggravation and mitigation are applied to the potential penalties in Rule 1843.3 and Section 19582(a)(3)(A).

D. The Mandatory Factors and Circumstances:

1) The past record of the licensee regarding violations of Business and Professions Code section 19581.

This is directed to a trainer's record in California for drug or medication violations. Pletcher has no record in California. **This is a mitigating circumstance.** The Attorney General points out that in 2006 Respondent received a 4 day suspension for an excess Mepivacaine violation in New York and that this should be an aggravating factor. However, the record show that this was Pletcher's only medication violation in a stellar 15 year career where he entered horses in numerous racing jurisdictions. **Under these facts we find that his record in other jurisdictions is neutral.**

2) The potential of the drug(s) to influence a horse's racing performance:

Dr. Arthur testified that if an injection of Procaine was given to a sore horse within a few hours of a race it could mask the pain and improve performance. It is true that Procaine would probably not be the drug of choice for this task. It is easily detected in the horse's urine and is not as effective as other numbing agents. In addition while it is possible that Wait a While received an injection shortly before the race that theory remains unproven. Nevertheless the issue is the **potential** to influence performance. Procaine does have that potential. **Therefore we find that this is an aggravating factor.**

3) The legal availability of the drug:

This factor is aimed at unlawful drugs and drugs that have not been approved for equine veterinary use. Procaine does not come under this category. Procaine is available from a veterinarian by prescription and was administered by veterinarians at Respondents

request, twice a day from September 30, 2008 to October 6, 2008. **This is a mitigating circumstance.**

4) Whether there is a reason to believe the responsible party knew of the administration of the drug or intentionally administered the drug:

This section is designed to assign additional culpability to a trainer who is directly involved in the administration of an illegal drug as opposed to negligence in allowing it to happen. It is not meant to apply to the series of Procaine Penicillin G shots that were given to Wait a While in early October by Respondent's vet with Respondent's knowledge and permission. This section is applicable to any unrecorded Procaine shots that may have been given to the mare close to the Breeders Cup race. There is no evidence that Pletcher administered such shots, or that that they were administered with his knowledge or permission. **This is a mitigating circumstance.**

5) The steps taken by the trainer to safeguard the horse:

This issue has been discussed at length in the section on Respondent's 1888 c. defense. We reject the Attorney General's accusation that the "security arrangements for Wait a While were lackadaisical and haphazard." We also reject Respondent's argument that he made every reasonable effort to protect Wait a While. Pletcher's security arrangements to not constitute mitigating circumstances or aggravating factors. **This is a neutral factor.**

6) The steps taken by an owner to safeguard against subsequent medication violations including, but not limited to, the transfer of the horse(s) to an unaffiliated trainer:

This factor Not Applicable.

7) The probability of environmental contamination or inadvertent exposure due to human drug use or other factors:

No evidence was presented on this issue. **This is a neutral factor**

8) The purse of the race:

The larger the purse the more the connections have to gain. Here the purse had a guarantee of \$2,000,000 and had an actual available money of \$2,130,000. This is the largest purse in North America for a filly and mare race on the turf. In fact it is one of the largest, if not the largest purse in this category in the entire racing world. After the disqualification of Wait a While it carried the following purse money: 1st 1,150,200, 2nd \$426,000, 4th \$213,000, 5th \$108,630, 6th 53,250. **The size of the purse clearly makes this an aggravating factor.**

9) Whether the drug found to be present in the official test samples was one for which the horse was receiving treatment as determined through the process described in Rule 1842 of this division:

Rule 1842 describes the Official Veterinarian Report. "Every veterinarian who treats a horse within the inclosure shall in writing on a form prescribed by the Board, report to the official veterinarian in a manner prescribed by him, the name of the horse treated, the name of the trainer of the horse, the time of treatment and any other information requested by the official veterinarian." The purpose of this factor is to give credit to a trainer and his vet when they comply with this rule. In this case all of the Procaine Penicillin G injections that were given by Pletcher's veterinarians in early October were reported on the Veterinarian Report. **This is a circumstance in mitigation.**

10) Whether there was any suspicious wagering on the race:

There was no evidence of any suspicious wagering in any of the Breeders' Cup wagering pools. Considering what transpired in the pick 6 pool in a previous Breeders' Cup **the lack of suspicious wagering is a circumstance in mitigation.**

11) Whether the licensed trainer was acting under the advice of a licensed veterinarian:

As previously noted Pletcher was acting under the advice of his veterinarian, Dr. Joseph Dowd. The Board encourages trainers to make medication decisions in consultation with their veterinarian. **This is a circumstance in mitigation.**

Additional Factors and Circumstances:

12) Penalties in Recent Excess Procaine Cases:

It is instructive to consider the penalties imposed in two excess Procaine cases that occurred around the same time as this case. Trainer Mike Mitchell, in case 08DM020 had an excess Procaine complaint for a race that occurred on August 3, 2008. His veterinarians admitted that they injected the wrong horse with Procaine. They were fined \$4500. Mitchell admitted to a Rule 1843 violation and was fined \$500.

The 2nd case involved trainer Thomas Bell II. In case 08DM001 he had an excess Procaine finding for a horse he saddled on July 2, 2008. The penalty in that case was a \$2500 fine and a 15 day suspension that was stayed. In Pletcher's case his attorneys are requesting that we impose no fine and no suspension. The Attorney General, on the other hand is requesting a \$50,000 fine and a 30 day suspension. **The previous penalties imposed are closer to Respondent's request than the Attorney General's recommendation.**

13) The Uniqueness of the Breeders' Cup Races:

It is impossible to overstate the damage that drug violations in Breeders' Cup races can do to the integrity of the sport of thoroughbred horse racing. This is no longer the 1930's when the Sport of Kings seemed invincible. Now there are only a few days a year when the eyes of the sporting public turns to horse racing. The 1st Saturday in May still has that mystic. The Preakness and the Belmont do as well if the Kentucky Derby hero is going for the Triple Crown. And now joining those classics is the Breeders' Cup races. These races are particularly critical to California racing which stages no other classic races. Unless Rachael Alexandra and Zenyatta square off in a California Match Race, and unless the Breeders' Cup unwisely pulls out of California, the Breeders' Cup is our showcase. Catastrophic injuries, wagering scandals and drug positives can turn a celebration of the sport into hostility and condemnation. Respondent comes before us with the unenviable record of having the only drug violation in the last two consecutive Oak Tree at Santa Anita Breeders' Cup Races. **There is no question that a drug violation in the Breeders' Cup Filly and Mare Turf Race is a Very Serious Aggravating Factor.**

CONCLUSION

The fact that this drug violation occurred in the Breeders' Cup Filly and Mare Turf requires that the maximum suspension under Rule 1843.2 of 60 days be imposed. However the offense is somewhat mitigated because we find that Pletcher was treating Wait a While with Procaine Penicillin G on the recommendation of his veterinarian and that the treatment was terminated 18 days before the race. If, as we believe, another Procaine injection was given shortly before the race there is no evidence to suggest that this was done by Pletcher, or on his behalf. Therefore we hold that Pletcher should be placed on one year probation and that all but 10 days of his 60 day suspension should be stayed.

As to a fine a drug violation in a \$2,000,000 race demands a substantial one. The maximum of \$10,000 under Rule 1843.2 is insufficient. However the \$50,000 fine requested by the Attorney General is too high. We will be imposing, under Business & Professions Code Section 19582(a)(3)(A) a fine of \$25,000.

ORDER

Complaint No. SAC 09-0040 dated December 4, 2008, charging trainer Todd Pletcher, Lic. No. 272025 with violating CHRB Rule 1842.2, 1844 (a), (b), (d) and 1887, in that Wait a While, a horse trained by Pletcher ran in the 6th race at Santa Anita on October 24, 2008 with Procaine in her system in excess of the allowable amount is found TRUE. Therefore the CHRB enters the following ORDER.

- 1) Trainer Todd Pletcher is placed on one year probation. His trainer's license is ordered suspended for 60 days, with 50 days stayed, the stay to become permanent upon successful completion of probation without a further Class I, II, or III violation in California or an equivalent violation in any other North American Racing Jurisdiction
- 2) The ten day period of the suspension which is not stayed shall be served thirty days after this decision, including any appellate review becomes final.
- 3) Trainer Pletcher shall pay a fine of \$25,000, to be paid to the paymaster of purses thirty days after this decision, including any appellate review becomes final.

IT IS SO ORDERED

DATED: 12-17-09



STEFFAN IMHOFF,
Hearing Officer